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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

OSHMAN FAMILY JCC Employer, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 521 Union. (KIMBERLY PALMER, Petitioner)	Case No. Case No. 32-RD-1599 **SEIU LOCAL 521'S APPEAL FROM REGIONAL DIRECTOR'S FINDING THAT THERE WAS NO CONTRACT BAR**

The Regional Director should not have scheduled a decertification election. Pursuant to the Board's contract bar "rules," an agreement between the Employer and the Union prevents the holding of an election.

I. INTRODUCTION AND FACTUAL BACKGROUND

In or around November 2010, the Employer and Union scheduled three bargaining sessions, December 1, 6, and 13, 2010. The parties later scheduled a fourth and final bargaining session, for December 15, 2010.

The Employer and the Union ultimately met four times to negotiate a successor collective bargaining agreement. On December 1, 2010, the parties discuss ground rules. Nick Raisch ("Raisch"), Worksite Organizer and Chief Negotiator for SEIU Local 521, presented the Employer

with proposed ground rules. The parties made minor modifications to the proposed ground rules, and then initialed and signed them. (See Union Exhibit 1.) The Employer and SEIU Local 521 agreed in their ground rules that once the agreement was ratified, it would become final. Specifically, ground rule number four (4) states that: "The Employer and the Union will hold their own respective process for ratification of the tentative agreement within fifteen (15) days of when the overall tentative agreement has been reached to become final." (Union Exhibit 1, emphasis supplied.) At the hearing, the Employer's only witness Randi Brenowitz ("Brenowitz"), Human Resources Director, testified that at the time that the Employer signed the ground rules it did not understand what its ratification process would entail. She explained that the Employer had no plans to "ratify" the agreement, although it had a right under the ground rules to do so.

Also on December 1, 2010, the Union presented the Employer with half of its opening proposals. (See Union Exhibit 2.) The proposals that the Union presented to the Employer on December 1, 2010 were non-economic ones. On December 1, 2010, in response to receiving half of the Union's proposals, the Employer asked the Union to present it with all of its proposals, including its economic proposals.

The parties met again for negotiations on December 6, 2010. At that time, the Union presented the Employer with all of its proposals. (See Union Exhibit 3.) By December 6, 2010, the Union had presented the Employer with proposals relating to internal hiring processes, employee orientation, vacation, professional courtesy, layoff, COPE check-off, strikes and lockouts, successorship/accretion, wages, longevity benefits, health benefits, and performance evaluations. The Union had also proposed to move the existing Union Membership and Probation sections and Union Business sections to an earlier place in the contract. Lastly, the Union had presented "conceptual" proposals regarding lifetime JCC membership for retirees under specific circumstances, vacation scheduling, the choice of nine or twelve-month payroll for teachers, and paid time for bargaining. The Union did not present proposals regarding any other sections in the contract, nor advance any conceptual proposals other than the four stated above.

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On December 13, 2010, the parties met a third time for negotiations. The Employer created

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a document, Union Exhibit 4, which constituted its counter proposal to the Union's December 1st and 6th proposals. This Employer-drafted document, Union Exhibit 4, evidences the Employer's assent to numerous substantive tentative agreements. Specifically, the Employer manifested its tentative agreement to the Union's proposed changes to the language of contract section 2.3 (Internal Hiring Process), as evidenced by the type-written phrase "tentative agreement." The Union then assented to the Employer's counter offers regarding the remainder of the Internal Hiring Process language, as evidenced by Raisch's note "TA w/ sign off on language." (Union Exhibit 4, page 1.) Raisch testified that the Employer's negotiator explained verbally each aspect of the Employer's counter offer. Where the Employer had written "tentative agreement," Raisch responded, "We have agreement, let's move on." The Employer manifested its tentative agreements regarding the movement of the Union Membership and Probation section and the Union Business section to an earlier place in the contract, the Union's proposed strike and lockout language, and the Union's proposed longevity benefit language. (See Union Exhibit 4, page 2.) This assent is evidenced by the Employer's type-written phrase "tentative agreement," which appears in several places throughout page 2 of Union Exhibit 4. The Employer read these tentative agreements to the Union. Raisch said to the Employer, "We have agreement, let's move on." The Employer tentatively agreed to include in the contract the language of its current policy which provides retirees lifetime membership at the JCC under certain conditions. (See Union Exhibit 4, page 3.) The Employer read this tentative agreement to the Union. Raisch said to the Employer, "We have agreement, let's move on."

On December 13, 2010, the Employer presented its only Employer-initiated proposals. The Employer proposed to change the start and end of the employees' workweek. (Union Exhibit 4, page 3.) The Employer also proposed a cap on the educational reimbursement. (Id.)

On December 13, 2010, the parties scheduled one final bargaining session – December 15, 2010. Raisch typed notes to summarize the status of negotiations as of December 13, 2010. (Union Exhibit 5.) The last bullet point on the notes indicates that "both teams want to come to final agreement on 12.15.10." Raisch testified that the parties discussed that the December 15, 2010 session would be the last one, as they expected to be able to reach an overall tentative

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agreement on that day.

The parties met a last time for negotiations on December 15, 2010. At the December 15, 2010 bargaining session, the Union presented a Union-drafted counter offer to the Employer's December 13, 2010 offer. (See Union Exhibit 6.) The Union's document reiterates the earlier tentative agreement which was arrived at on December 13, 2010 regarding the internal hiring processes. (Union Exhibit 6, page 1.) The Union withdrew its proposal regarding employee orientation. The Union proposed a counter offer regarding vacation. (Id.) The Union tentatively agreed to the Employer's professional courtesy proposal. (Id.) The parties discussed the professional courtesy proposal and Raisch said to the Employer, "We have agreement, let's move on." The Union withdrew its layoff proposal. (Id.) The Union reiterated the tentative agreement regarding the movement of the Union Membership language to an earlier place in the contract. (Id.) The Union accepted the Employer's December 13, 2010 counter offer regarding COPE check-off. (Id.) This is manifested by the Union writing "tentative agreement" under "Union Proposal 7 Union Business." (Id.) Raisch said to the Employer, "We have agreement, let's move on." The Union reiterated the parties' December 13, 2010 tentative agreement regarding the strike and lockout language. (Id.) Raisch said, "We have agreement, let's move on." The Union withdrew the successorship/accretion proposal. (Id.) The Union made a counter offer regarding wages. (Union Exhibit 6, pages 1-2.) At that time, the parties tentatively agreed that the employees would receive a 2% wage increase in 2011, a 2.5% wage increase in 2012, and a 3% wage increase in 2013. The parties reached tentative agreement regarding the Union's December 6, 2010 proposal to change Section 13.1 (Health Insurance). This tentative agreement is manifested by the Union writing the phrase "13.1 Tentative Agreement". (Exhibit 6, page 2.) The Union presented a counter offer regarding the language of Section 13.2, to which the Employer agreed. (Id.) The Employer agreed not to change employees' share of health care costs for the life of the contract. The Employer agreed to provide employees who decline health benefit coverage with a $100 a month in lieu benefit. The Union withdrew its performance evaluation proposal. (Id.) The Union reiterated the parties' tentative agreement regarding the Employer providing retired employees lifetime JCC benefits under certain circumstances. (Id.) The Union withdrew its

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"conceptual" proposal regarding vacation scheduling. (Id.) The Union made a modest counter offer regarding paid time for bargaining sessions. (Id.) The Union assented to the Employer's workweek proposal, as manifested by the Union writing "tentative agreement." Raisch explained to the Employer, "We have agreement, let's move on." The Union counter offered regarding the education reimbursement cap, specifically, that current employees should be grandfathered. (Id.) The parties tentatively agreed to a two-year contract, expiring on December 31, 2013.

On December 15, 2010, all outstanding subjects were either tentatively agreed to or withdrawn. At the conclusion of the bargaining session, the parties agreed that they had reached an overall tentative agreement. They did not schedule a further bargaining session because one was not necessary. They shook hands and expressed gratitude to one another for having amicably arrived at a successor agreement. The Union explained that it would schedule a ratification vote and apprise the Employer of the outcome thereof. The Employer expressed its agreement regarding this plan. At the hearing, the Petitioner, Kimberly Palmer, who was present at the December 15, 2010 negotiations, acknowledged that an overall tentative agreement was reached and that the Employer's attorney, Feldstein was responsible for preparing the draft of the agreement.

Raisch typed notes summarizing the December 15, 2010 negotiations. (Union Exhibit 7.) Raisch wrote that "management wants us to schedule our ratification as soon as possible so we can finalize the agreement." (Union Exhibit 7.) The Union's ratification vote was critical because, pursuant to the parties' ground rules, ratification of the agreement is what made the agreement final. (Union Exhibit 1, ground rule 4.)

On or about January 4, 2011, the Union held its contract ratification vote. The Union presented its members with a contract ratification document, which summarized the parties' tentative agreements. (Union Exhibit 9.) The members overwhelmingly approved the contract, by a vote of 30 to 6, out of a unit of 44. Immediately following the ratification vote, Raisch informed Brenowitz of the results. Brenowitz wrote Raisch and the Employer's bargaining team an email memorializing what Raisch had told her and indicating that all that remained was for Raisch and the Employer's attorney to update the language of the tentative agreements and then the parties

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would sign the final document. (Union Exhibit 10.) Specifically, Brenowitz wrote, that Raisch had stopped by to tell her that the "bargaining unit has met and there were 30 votes in favor; 4 (sic) against; and 8 (sic) people who were unable to attend the meeting. (Id.) This means the contract has been ratified." (Id.) Her email indicates assent to the overall tentative agreement, and acknowledgement that the Union ratified it. Her email also indicates, by omission, that the Employer was not going to exercise its right under the ground rules to "ratify" the agreement. (See Union Exhibit 1, ground rule 4.) Raisch of the Union later made all the "updates" that the parties had contemplated at the table. (See Union Exhibit 11.) Union Exhibit 11 incorporates all of the parties' overall tentative agreements.

At the hearing, the Employer's witness, Brenowitz, testified unequivocally that the parties reached an overall tentative agreement on December 15, 2010. She said that Raisch's testimony regarding all of the tentative agreements that the parties had reached on December 15, 2010 was true and accurate. She agreed with Raisch's testimony that there was an overall tentative agreement regarding all of the "substantive terms" of the successor collective bargaining agreement. She understood that, after reaching an overall tentative agreement on December 15, 2010, neither party would dawdle and instead would work together to determine the precise language of the agreement and then sign it. She testified that the language was not "100%" worked out, and that Raisch and the Employer's counsel, Steve Feldstein, would work out that precise language.

Brenowitz testified at the hearing that she learned about a decertification petition being filed. She was asked, presumably by her attorney or the Board Agent or both, whether there was a contract, and she replied no. She did not believe that there was a contract because Raisch and Feldstein had not cleaned up the language and the parties had not signed a final version. Through this testimony, Brenowitz revealed her misunderstanding that a contract has to be "100% worked out" for it to serve as a contract bar.

Brenowitz testified that, three years ago, the parties negotiated a full tentative agreement, which neither party initialed or signed until a version was "done, done." Once a version was "done, done," the parties signed the entire document. Union Exhibit 12 confirms this testimony.

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Union Exhibit 12 is an excerpt of the prior collective bargaining agreement, which evidences that the effective date of the agreement was January 1, 2007 despite the agreement being signed much later, on March 26, 2007. This demonstrates that the parties have a past practice of finalizing an agreement before signing it, and that the signing of an agreement is a mere formality.

The testimony of both Raisch and Brenowitz confirms that the parties have historically had a casual and mutually trusting collective bargaining relationship, which has allowed the parties to be informal in their manner of bargaining. This explains why the parties did not initial or sign their tentative agreements in the last or recent round of bargaining. The Board should not apply its contract bar "rule" in a way that penalizes parties for carrying out their negotiations in a trusting and harmonious manner.

II. LEGAL ARGUMENT

A. THE DECERTIFICATION PETITION IS BARRED PURSUANT TO THE CONTRACT BAR DOCTRINE

1. The Parties' Bargaining Proposals, Read In Conjunction With The Prior CBA And Brenowitz's Email, Are Sufficient For Contract Bar Purposes

The Board should consider several documents in conjunction with one another to determine the existence of a contract bar. The parties' signed December 1, 2010 ground rules (specifically rule 4) [Union Exhibit 1], read in conjunction with the Employer's December 13, 2010 proposal (wherein more than eight tentative agreements are expressed in the Employer's type-written text) [Union Exhibit 4], read in conjunction with the Union's December 15, 2010 proposal (wherein more than eleven tentative agreements are expressed in the Union's type-written text and where three other proposals are withdrawn) [Union Exhibit 6], read in conjunction with Brenowitz's January 4, 2011 email (wherein she acknowledges that the employees ratified the agreement) [Union Exhibit 10], read in conjunction with the existing agreement (which evidences how many contract sections the parties left untouched) [Board Exhibit 2], establish the existence of a tentative agreement that contains substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship.

It would be unrealistic to require the parties to put all their tentative agreements in one

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single document. Such would ignore the realities of most parties' bargaining behavior. The Board has previously found that in order to constitute a bar a contract need not be encompassed within a single formal document, but may consist of an exchange of the written proposal and a written acceptance. (See Diversified Services, Inc., 225 NLRB 158 (1976)(employer's signed cover letter accompanying its proposal, coupled with the union's execution of the proposal prior to the filing of the petition is sufficient to bar the petition).)

Further, the Board need not require that the party asserting the existence of a contract bar proffer a *signed* document in order to establish the existence of a contract bar. In Georgia Purchasing, Inc., 230 NLRB 183 (1977), the Board found that a petition was barred by an effective collective bargaining agreement where the employer and union exchanged telegrams which expressed the terms of their tentative agreement. The Board found the telegrams to be evidence of a contract bar even though the telegrams were **not signed** documents and even though the parties later refined their agreement. The Board **rejected** the Regional Director's finding that no contract bar existed because there was no signed agreement at the time of the filing of the petition.

2. To The Extent That The Region Believes That Parties Must Initial Or Sign A Tentative Agreement For It To Serve As A Contract Bar, The Region Must Revamp Its "Rule"

The Board has devised the contract bar doctrine in an effort to stabilize the employer-union relationship. The doctrine is discretionary, and not statutorily mandated. The formulation, application, and modification of the Board's contract bar rules are committed to the Board's judgment. (Carpenters Local 1545 v. Vincent, 286 F.2d 127 (2d Cir. 1960).)

The Board must exercise this discretion and modify its current rule to allow it to recognize the existence of a contract bar when there is evidence that an agreement exists which imparts sufficient stability to the bargaining relationship to justify withholding a present determination of representation. The Board's rule must be modified to allow for the following exception: **If the Board determines that the incumbent union, through the filing of a position statement or other response to the Board's investigatory inquiries, makes a *prima facie* showing of the existence of a contract bar, and the Board orders a hearing regarding such matter based on**

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the *prima facie* showing, if at the hearing the Employer concedes under oath that the parties reached tentative agreement on substantive issues, the Board must find that there is in fact a contract bar. Here, the Employer testified under oath that the parties reached an overall tentative agreement regarding all substantive terms. The terms of that tentative agreement can be ascertained by reading the Employer's December 13, 2010 proposal [Union Exhibit 4] and Union's December 15, 2010 proposal [Union Exhibit 6] in conjunction with the prior contract [Board Exhibit 2]. If there was any ambiguity regarding the terms of the tentative agreements, the Employer's testimony clarified that. The Board must be mindful of the fact that it need not determine the existence of an agreement which is sufficient to create a final and binding contract, merely a tentative agreement sufficient to bar an election.

To narrowly apply the contract bar "rule," ignoring the barring nature of the parties' current agreement, would undermine and thwart the purposes of the National Labor Relations Act.

B. ALTERNATELY, THE PRIOR CONTRACT IS STILL IN EFFECT PURSUANT TO ITS EVERGREEN CLAUSE

At the conclusion of the hearing, the Employer argued that the prior contract **"is still in effect."** SEIU Local 521 will accept the representation by the Employer that the prior contract is still in effect. The parties' prior collective bargaining agreement, Board Exhibit 2, includes an evergreen clause which provides that the agreement shall remain in full force and effect year after year unless, at least ninety (90) days prior to the first (1st) day of January, 2010 or to the first day of January of any subsequent year, either party files written notice with the other of its desire to amend, modify or terminate the agreement. (See also Union Exhibit 12.) At the hearing, the Employer had an opportunity to call witnesses and present documentary evidence. The Employer produced no evidence that either party had furnished the other with written notice of its intent to amend, modify or terminate the collective bargaining agreement. Likewise, the Employer did not present evidence that Raisch or any other SEIU Local 521 had sufficient authority to reopen the contract on behalf of the Union. The absence of such evidence, combined with the Employer's representation to the Board that the prior contract "is still in effect," leads to the irrefutable conclusion that the parties' current contract, Board Exhibit 2, has rolled over one additional year

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pursuant to the evergreen clause contained therein. The collective bargaining agreement is in effect until December 31, 2011, pursuant to its terms.

It is not unusual for the parties to negotiate over a successor agreement, only to later decide to allow the contract to roll over one additional year pursuant to the agreement's evergreen clause. In fact, according to the testimony of Raisch, in 2009, in anticipation of the agreement "expiring" on December 31, 2009, the parties met several times with the intent of negotiating a successor agreement. Ultimately, the parties agreed not to change the contract and to instead allow the contract to roll over an additional year until December 31, 2010. The parties did not execute an agreement evidencing a one-year extension through December 31, 2010. Such was not necessary because the agreement extended by virtue of the evergreen clause.

The Board has long held that an automatically renewed agreement bars an election petition filed during the renewal period. (See ALJUD Licensed Home Care Servs., 345 NLRB 88 (2005).) The Board explicitly recognized the bar quality of automatically renewed agreements when it determined the Board's contract bar "rules" in the case Deluxe Metal Furniture, 121 NLRB 995 (1958). (Deluxe Metal Furniture, 121, NLRB 995 (1958).) The Board has continued to bar election petitions filed during the term of the automatic renewal. (See Empire Screen Printing, Inc., 249 NLRB 718 (1980); Road Materials, 193 NLRB 990 (1971); Moore Drop Forging Co., 168 NLRB 984 (1967).) The Board imposed no requirement in such cases that the parties' renewal take the form of a newly executed document.

If the Board does not find that the parties' 2010 negotiations resulted in an agreement which is sufficient to bar a decertification election, alternately, the Board must conclude that the parties never reopened the contract and the prior contract remains in effect. The Employer has conceded as much.

III. CONCLUSION

For the foregoing reasons, the Regional Director erred in refusing to dismiss the decertification petition.

Dated: February 18, 2011

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PROOF OF SERVICE
(CCP § 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On February 18, 2011, I served upon the following parties in this action:

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copies of the document(s) described as:

SEIU LOCAL 521'S APPEAL OF REGIONAL DIRECTOR'S DECISION

[ ] **BY MAIL** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

[X] **BY FACSIMILE** I caused to be transmitted each document listed herein via the fax number(s) listed above or on the attached service list.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on February 18, 2011.

Stephanie Mizuhara

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